Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

John A. Scott, *Petitioner*,

v.

State of Iowa, *Respondent*.

On Petition for a Writ of Certiorari for the Iowa Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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I. Whether a police officer, after finding no weapons during a pat-down search, may continue to search or question a person on matters unrelated to the justification for the initial stop in order to determine if an item felt during the pat-down search, whose indentity was not immediately apparent, was contraband.

II. Whether statements made in response to a police officer's questions by a person held at gunpoint in a spread-eagle position by four police officers may be admitted into evidence where the police officer did not advise the person of his Miranda rights.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

John A. Scott, *Petitioner*,

v.

State of Iowa, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE IOWA SUPREME COURT

John A. Scott respectfully petitions for a writ of certiorari to review the judgment of the Iowa Supreme Court in this case.

OPINIONS BELOW

The opinion of the Iowa Supreme Court (App., *infra*, 21-33) is reported at 518 N.W.2d 347 (Iowa 1994). The opinion of the District Court (App., *infra*, 34 -43) is unreported.

JURISDICTION

The Iowa Supreme Court entered its decision on June 22, 1994. (App., *infra*, 21-33). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

This Petition for Writ of Certiorari involves the construction and application of United States Constitution Amendments IV and V, set forth as follows:

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On May 17, 1993, at approximately 7:30 P.M., John A. Scott was a passenger in an automobile that was stopped by Police Officer Blad in Des Moines, Iowa. Officer Blad stopped the vehicle at the

request of police officers who had reported seeing the vehicle leaving an area where gun shots had been fired.

Officer Blad, with her gun drawn, ordered Scott and the driver of the vehicle to get out of the car and place their hands on the trunk of the car with their legs spread apart. After two additional officers arrived, Officer Blad conducted a pat-down search of Scott while another officer conducted a pat-down search of the driver. The pat-down search was conducted to determine if either Scott or the driver was armed with weapons. No weapons were found.

While conducting the pat-down search for weapons, Officer Blad felt something in Scott's right pocket. Officer Blad could tell that the item was not a weapon or evidence of a weapon, but the exact nature of the object was not immediately apparent to Officer Blad.

Officer Blad, while still holding Scott at gun point, then questioned Scott concerning what he had in his pocket. In response to her questioning, Scott told Officer Blad that the item was marijuana. Scott had not been advised of his Miranda rights at the time of the search and subsequent questioning of him.

Officer Blad then reached into Scott's right pocket and removed the marijuana from it. After two or three additional questions, Officer Blad placed Scott under arrest.

On June 10, 1993, Scott was arraigned on the charge of Possession of Marijuana, in violation of Iowa Code section 204.401(3) (1993). Scott filed a Motion to Suppress the marijuana discovered on his person and the statements made by him in response to Officer Blad's questioning.

On September 21, 1993, the district court issued its ruling sustaining Scott's

Motion to Suppress evidence. The District Court determined that the scope of Officer Blad's search exceeded the Fourth Amendment limitations of a pat-down search as set forth in Terry v. Ohio, 392 U.S. 1 (1968), and Minnesota v. Dickerson, ____ U.S. ____, 113 S. Ct. 2130 (1993).

The district court further ruled that Scott's Fifth Amendment rights were violated. The Court ruled that Scott was in custody at the time of the pat-down search by Officer Blad. Thus, the questioning of Scott by Officer Blad concerning what was in his pocket was obtained as a result of improper custodial interrogation without first advising him of his Miranda rights.

On October 11, 1993, the State of Iowa filed, with the Iowa Supreme Court, an Application for Discretionary Review of the Trial Court's order sustaining Defendant's Motion to Suppress evidence.

The State's Application for Discretionary Review was granted.

On June 22, 1994, the Iowa Supreme Court issued its decision reversing the district court's ruling on Scott's suppression motion. The Iowa Supreme Court ruled that Officer Blad's search of Scott did not exceed the permissible scope of the pat-down search. The Iowa Supreme Court further ruled that the district court incorrectly determined that Scott was in custody during the investigatory stop.

REASONS FOR GRANTING THE PETITION

Scott's Petition for Writ of Certiorari should be granted for several reasons. First, the Iowa Supreme Court's decision in this case is in direct conflict with the Fourth Amendment principles set forth by this Court in Terry v. Ohio, 392 U.S. (1968), and

Minnesota v. Dickerson, ____ U.S. _____, 113 S. Ct. 2130 (1993).

This case also presents an opportunity to resolve the conflicts among jurisdictions concerning the proper interpretation of Terry and Dickerson. Moreover, the decision of the Iowa Supreme Court is erroneous and the issues presented by this case are important.

A. The Iowa Supreme Court's Decision in this Case is Erroneous and Conflicts with the Unites States Supreme Court's Decisions Defining the Scope of Pat-Down Searches

When an officer is justified in believing that an individual who exhibits suspicious behavior is armed and presently dangerous to the officer or to others, the officer may conduct a pat-down search of that person to determine only whether the person is carrying a weapon. Minnesota v. Dickerson, ___ U.S. ____, ____, 113 S. Ct. 2130, 2136, (1993). The purpose of the limited protective search is not to

discover evidence of crime, but to allow the officer to pursue his or her investigation without fear of violence. Id.

The protective search must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. Id. If the search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits must be suppressed. Id.

In Dickerson, the Supreme Court addressed the question of whether contraband detected through the sense of touch during a pat-down search may be admitted into evidence. Id. at ____, 113 S. Ct. at 2134. The Court reasoned that such contraband could be admitted into evidence so long as the officer's search stays within the bounds of Terry. See

Dickerson, ____ U.S. ____, 113 S. Ct. at 2136. Specifically, the Court held that if, during the lawful pat-down of a person's outer clothing, the officer feels an object whose contour or mass makes its identity immediately apparent, the officer is entitled to seize such contraband because there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. Id. at ____, 113 S. Ct. at 2137.

The Iowa Supreme Court did not follow the above legal principles. Under its erroneous interpretation, an officer's pat-down search incident to an investigatory stop can be expanded beyond a search for weapons to protect the officer. Such an expanded search was approved by the Iowa Court even where, as here, the search focused on an object that the officer knew was not a weapon and the contour and mass of the object did not

make the object's illicit identity immediately apparent. Such a broadening of the scope of the pat-down search by the Iowa Supreme Court directly conflicts with the decisions of the United States Supreme Court and, as discussed below, resulted in the Iowa Supreme Court's erroneous conclusion in this case.

Scott was a passenger in a motor vehicle that was stopped by Officer Blad because she believed shots came from the vehicle in which Scott was riding. Scott was taken from the car at gun point and a pat-down search for weapons or evidence of weapons was conducted by Officer Blad. Officer Blad's justification for the pat-down search was consistent with her reason for stopping the vehicle in which Scott was riding; she testified that her sole purpose for stopping the vehicle was to search for weapons or evidence of weapons.

Once Officer Blad completed the pat-down search and determined that Scott had no weapons, her search of Scott should have terminated. At that time, by her own testimony, it was not immediately apparent to Officer Blad that the item she felt in Scott's pocket was contraband. Officer Blad's continuing questioning of Scott on a subject unrelated to the reason for the investigatory stop and her subsequent reaching into Scott's pocket exceeded the Fourth Amendment constitutional bounds of investigatory stops and pat-down searches.

B. The Iowa Supreme Court's Decision as to the Scope of Investigatory Stops Conflicts with the Decisions of Other Jurisdictions

Other jurisdictions considering similar circumstances have also reached the conclusion that once an officer's suspicions requiring the investigatory stop have been dispelled, it is illegal to continue the detention of that person or to interrogate that person concerning matters unconnected

to the initial reason for the investigatory stop. See e.g., United States v. Thomas, 863 F.2d 622 (9th Cir. 1988) (Where, after suspect alighted from car and officer could see he was not wearing clothing indicated in description of two suspects and the suspect identified himself and gave plausible explanation for his activities, it was illegal to continue the detention for questioning about a gun); United States v. Millan-Diaz, 975 F.2d 720 (10th Cir. 1992) (stop to investigate suspicion of illegal alien smuggling later became illegal, along with additional questioning, as reasonable suspicions disappeared once it was determined that the driver was the only occupant of vehicle); United States v. Walker, 933 F.2d 812 (10th Cir. 1991) (where defendant, stopped for speeding, established he had license and was entitled to operate the car, further detention to question about guns and drugs illegal); United States v.

Guzman, 864 F.2d 1512 (10th Cir. 1988) (where car stopped for seatbelt violation, questioning on other subjects improper); J.R.H. v. State, 428 So. 2d 786 (Fla. Dist. Ct. App. 1983) (questioning about matters unrelated to the justification for the stop is not permissible); State v. Wight, 617 P.2d 928 (Or. 1980) (though truck stopped because it was weaving, face-to-face confrontation with driver dispelled any suspicion he was under the influence and, thus, continued detention while officer asked defendant if he had any beer or marijuana in car, which defendant then produced, was illegal); State v. Carter, 578 P.2d 790 (Or. 1977) (if officer, who stopped defendants for speeding made inquiries not related to traffic infraction after records check revealed nothing, stop was unreasonably intrusive and, if officer observed marijuana after making those inquiries, observation was tainted by

unreasonable intrusiveness); Commonwealth v. Wasiuta, 421 A.2d 710 (Penn. Sup. Ct. 1980) (when the officer discovered that what he had thought was a gun was actually a camera, the officer had no further reason to hold defendant and, thus, admissions in response to later questioning suppressed); Leake v Commonwealth, 265 S.E.2d 701 (Va. 1980) (police officer's grasping and shaking of bag held by defendant, contemporaneous with officer's inquiry concerning contents of bag, constituted unreasonable search where investigatory stop was limited to a request for information concerning the occupant of an apartment).

Recently the North Carolina Court of Appeals was faced with interpreting Dickerson's "plain feel" requirement and reached a result in direct contradiction with the result reached by the Iowa Supreme Court. See State v. Beveridge, ____, N.C. App. ____, 436 S.E.2d 912 (1993). In

Beveridge, just as in this case, the defendant was the passenger in an automobile stopped by a police officer. Id. at ____, 436 S.E.2d at 912. As part of the stop, the officer conducted a pat-down search of the defendant for weapons. Id. at ____, 436 S.E.2d at 912.

During the pat-down search, the officer felt a plastic bag in the defendant's pocket. Id. at ____, 436 S.E.2d at 913 The officer knew the bag did not contain a weapon but did not know, at that time, that the bag contained contraband. Id. at ____, 436 S.E.2d at (916). Rather than discontinue the search, the officer questioned the defendant concerning the bag and required him to take it out of his pocket. Id. at ____, 436 S.E.2d at 916.

In concluding that extending the scope of the search violated the Fourth Amendment, the North Carolina Court, relying on Dickerson, noted that while the officer was

justified in conducting a limited pat-down of the defendant to determine whether the defendant was armed, once the officer concluded that there was no weapon he could not continue to search or question the defendant in order to ascertain whether the plastic bag was indeed contraband. Id. at ____, 436 S.E.2d at 916. Such an interpretation of Dickerson is completely different than that reached by the Iowa Supreme Court.

It is clear that this case presents a recurring scenario. It is, now, necessary for the Supreme Court to resolve these important and significant conflicts in the law.

C. The Iowa Supreme Court's Decision that Scott was not Subject to Custodial Interrogation Conflicts with Existing Supreme Court Precedent

The Supreme Court has defined custodial interrogation as questioning initiated by an officer after a person has been taken into

custody or otherwise deprived of his freedom of action in any significant way. Miranda v. Arizona, 384 U.S. 436, 444 (1966). With regard to traffic stops, the Supreme Court, in Berkemer v. McCarty, 468 U.S. 420 (1984), determined that officers are not required to advise people of their Miranda rights during the course of an ordinary traffic stop. Id. at 440. Even if this case is considered an ordinary traffic stop, however, Berkemer further provides that if a motorist, who has been detained pursuant to a traffic stop, thereafter is subject to treatment that renders that person in custody for practical purposes, the motorist is entitled to the full panoply of protections prescribed by Miranda. See id.

In this case, the Iowa Supreme Court erroneously equated this case with the ordinary traffic stop found in Berkemer. In contrast to Berkemer, however, the automobile in which Scott was riding was not

stopped for a traffic violation but, rather, the automobile was stopped to investigate the commission of a violent crime. Further, as the Court points out in Berkemer, while an ordinary traffic stop requires few if any restraints comparable to a formal arrest, See id., the facts in this case involve circumstances much more akin to a formal arrest, including the detention of Scott at gun point and requiring Scott to stand against a car with his hands on the car and his feet spread, thereby, completely restricting his movement. This is the coercive atmosphere that justifies the requirements set forth in Miranda.

As Berkemer accurately points out, the inquiry is how a reasonable person would have understood the situation. Id. at 442. A reasonable person in Scott's position would have viewed the situation he was placed in much differently than the circumstances surrounding an ordinary

traffic stop. Ordinary traffic stops do not involve removing the occupants of vehicles at gun point and requiring them to remain spread-eagled against the back of a vehicle.

Because Scott was subject to in-custody questioning without first being advised of his rights pursuant to Miranda, the statements made by Scott in response to that questioning should have been suppressed. Further, the marijuana discovered in defendant's pocket should also be suppressed as a fruit of the illegal questioning.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF IOWA

No. 190 / 93-1468

Filed June 22, 1994

STATE OF IOWA,

Appellant,

VS.

JOHN A. SCOTT,

Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, District Associate Judge.

Discretionary review of a court order sustaining a motion to suppress. **REVERSED AND REMANDED.**

Considered by Harris, P.J. and Larson, Neuman, Snell, and Andreasen, JJ.

ANDREASEN, Justice.

John Scott was charged with the crime of possession of a controlled substance, marijuana. He filed a motion to suppress evidence seized by a police officer from his pocket during a pat-down search. Iowa R. Crim. P. 11(1). The district court granted his motion finding that the scope of the pat-down search went beyond that permitted under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1968, 20 L. Ed. 2d 889 (1968), and that the officer's inquiry as to what was in his pocket at the time of the search constituted "custodial interrogation" prohibited by the doctrine enunciated in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We granted the State's request for discretionary review. Iowa R. Crim. P. 11(2). We reverse the ruling and remand the case for trial.

I. Background.

On May 17, 1993, at approximately 7:30 p.m., Scott was a passenger in an automobile that was stopped by police officer Larina Blad in Des Moines, Iowa. Officer Blad stopped the vehicle at the request of police officers who had reported seeing the vehicle leave an area where gunshots had been fired. Officer Blad, with her gun drawn, ordered Scott and the driver to get out of the car and to place their hands on the car with their legs spread apart. After two additional officers arrived, officer Blad conducted a pat-down search of Scott's outer clothing while another officer conducted a pat-down search of the driver.

While conducting the pat-down search for weapons or bullet casings, officer Blad felt an object in Scott's pants pocket she thought was narcotics. She "heard the sound of a baggy and felt a slender shape like a joint."

Simultaneously, she knew the object was not a weapon. She asked Scott what he had in his pocket. He told her "I don't want no trouble, I ain't going to lie, it's marijuana." Blad then removed the baggy from Scott's pocket. After two or three additional questions, officer Blad placed Scott under arrest.

II. Scope of Review.

The motion to suppress raises both a Fourth and Fifth Amendment challenge under the federal constitution to the admissibility of evidence seized from Scott's pocket. Our review of constitutional issues is de novo. State v. Riley, 501 N.W.2d 487, 488 (Iowa 1993) (Terry stop); State v. Evans, 495 N.W.2d 760, 762 (Iowa 1993) (Miranda Issue).

III. Terry Stop and Frisk.

In Terry the Supreme Court held that, consistent with the Fourth Amendment, police may stop persons to investigate

based on a reasonable suspicion that "criminal activity may be afoot . . . ." 392 U.S. at 30, 88 S. Ct. at 1884, 20 L. Ed. 2d at 911. The trial court found, and Scott does not dispute, officer Blad had reasonable cause to believe a crime may have occurred and there were articulate objective facts to justify the initial stop of the vehicle in which Scott was a passenger and to briefly detain and conduct a warrantless protective weapons search of the vehicle and its occupants. Michigan v. Long, 463 U.S. 1032, 1049-50, 103 S. Ct. 3469, 3480, 77 L. Ed. 2d 1201, 1219-20 (1983); cf. State v. Becker, 458 N.W.2d 604, 607 (Iowa 1990) (articulate suspicion of criminal activity of speeding driver did not extend to passenger). Under the circumstances, a reasonable person "would be warranted in the belief that his safety or that of other was in

danger." Terry, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909.

Relying on Minnesota v. Dickerson, 508 U.S. ____, ____, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 348 (1993), the district court concluded that seizure of the marijuana from Scott's pocket exceeded the scope of a Terry stop. The court reasoned that officer Blad knew when she patted down his clothing that the object in Scott's pocket was not a weapon; nor was it immediately apparent that the object was contraband. The court concluded officer Blad exceeded the cope of a permissible search by asking Scott to identify the object. We disagree and conclude that officer Blad did not overstep the bounds of a protective weapons search under Terry.

The State concedes that officer Bald did not immediately recognize the object in Scott's pocket as contraband, she only

suspected it was. However, unlike the officer in Dickerson, officer Blad did not attempt to further identify the object by "squeezing, sliding, and otherwise manipulating the contents of the defendant's pocket . . . ." Id. at ____, 113 S. Ct. at 2138, 124 L. Ed. 2d at 347. The scope of a weapons search is exceeded where

> the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "[t]he sole justification of the search [under Terry:] . . . the protection of the police officer and other nearby." It therefore amounted to the sort of evidentiary search that Terry expressly refused to authorize . . . and that we have condemned in subsequent cases.

Id. at ____, 113 S. Ct. at 2138-39, 124 L. Ed. 2d at 347-48. (Citations omitted). In Dickerson, the Court stated:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour

> or mass makes its identity immediately apparent, privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

Id. at ____, 113 S. Ct. at 2137, 124 L. Ed. 2d at 346; see also United States v. Hughes, 15 F.3d 798, 802 (8th Cir. 1994).

Here, officer Blad recognized that the object in Scott's pocket was not a weapon; she suspected it was narcotics but she did not attempt to confirm the suspicion by further manipulation. If the circumstances during an investigatory stop give rise to suspicions unrelated to the reason for the stop, an officer may broaden his or her inquiry and satisfy those suspicions. United States v. Barahona, 990 F.2d 412, 416-17 (8th Cir 1993). Asking Scott the question did not constitute a search. See United States v. Tod, 263 U.S. 149, 155, 44 S. Ct. 54, 56,

68 L. Ed. 221, 224 (1923). We conclude officer Blad did not exceed the scope of an investigatory stop and weapons search by asking Scott about the object.

IV. Miranda Protection.

In Miranda the Court addressed the question of how the Fifth Amendment guarantee against self-incrimination could provide protection from coercive pressures that may be imposed on a suspect during custodial interrogations. Miranda, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. The central principle established in Miranda is: "if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated [in Miranda], his responses cannot be introduced into evidence to establish his guilt." Berkemer v. McCarty, 468 U.S. 420, 429, 104 S. Ct. 3138, 3144, 82 L. Ed. 317, 328 (1984).

> In determining whether an individual [is] in custody, a court must examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there was a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."

Stansbury v. California, 511 U. S. ____, ____, 114 S. Ct. 1526, 1528-29, 128 L. Ed. 2d 293, 298 (1994) (citation omitted). We apply an objective standard when making this determination. Id. at ____, 114 S. Ct. at 1529, 128 L. Ed. 2d at 299-30.

The district court found Scott was in custody at the time of the pat-down search because guns were drawn and his freedom of movement was restrained. Because no Miranda warnings were given prior to officer Blad's question about the item in Scott's pocket, the court concluded the question violated his Miranda rights. We disagree.

The temporary detention of a motorist in an ordinary traffic stop is not considered "in custody" for purposes of Miranda. Berkemer, 468 U.S. at 437-39, 104 S. Ct. at 3148-50, 82 L. Ed. 2d at 333-34. Similarly, the use of a weapon by a peace officer as a protective measure during an investigatory stop does not convert the stop into an arrest if the officer's action is reasonable under the circumstances. In re S.A.W., 499 N.W.2d 739, 742 (Iowa App. 1993); United States v. Raino, 980 F.2d 1148, 1149-50 (8th Cir. 1992). Officers are entitle to protect themselves. To allow such a protective measure to transform a Terry stop into an arrest would create a dangerous dilemma for law enforcement officers. United States v. Jackson, 652 F.2d 244, 249 (2d Cir. 1981).

> If the officer approaches a [suspect] with his gun still in his holster, he increases the

> risk that he will be shot. If, on the other hand, he protects himself by drawing his gun, he increases the risk that a court will set the criminal free by construing his action as an illegal arrest. We decline to impose such a Hobson's Choice on our law enforcement personnel.

Id. 249-50. Likewise, we believe that when an office detects an object that my be contraband during a pat-down search, the officer may ask what it is because "the right to interrogate during a 'stop' is the essence of Terry and its progeny." United States v. Oates, 560 F.2d 45, 63 (2d Cir. 1977).

We conclude Scott was not in custody for Miranda purposes when he was asked about the object in his pocket. The investigatory stop was temporary and brief. The stop and search was conducted in public. The officers followed routine procedures during the pat-down search. The marijuana was removed from Scott's pocket only after he told the officer

that he had marijuana in his pocket. At that time the officer had probable cause to seize the baggy and to arrest Scott for illegal possession. The investigatory stop ripened into a probable cause arrest. We therefore reverse the district court ruling on the motion to suppress and remand the case for trial.

REVERSED AND REMANDED.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

****

STATE OF IOWA,	)	
	)	CRIMINAL NO. 70821
Plaintiff,	)	
	)	
VS.	)	RULING ON
	)	DEFENDANT'S MOTION
JOHN SCOTT,	)	TO SUPPRESS
	)	
Defendant.	)	

****

Hearing was held on Defendant's Motion to Suppress on September 1, 1993, with the defendant present, along with his attorney, F. John Spellman, and the attorney for the State of Iowa, Greg Brandt. It is noted by the Court that the Motion to Suppress was filed August 11, 1993. In the State's Resistance to the Motion to Suppress, the State argued that the Motion was untimely pursuant to Iowa Rule of Criminal Procedure 10(4). The Court does note that the Motion to Suppress is untimely under that Rule, but

further notes the catastrophe which struck the City of Des Moines during the period of approximately July 10 through July 23 during which the courthouse was closed for a considerable amount of time as well as many downtown office buildings and other places of business. The Court notes that the Motion to Suppress was filed August 11, 1993, 49 days after the arraignment of the defendant.

Considering the fact that the Motion to Suppress was filed within a short amount of time after the deadline under Iowa Rule of Criminal Procedure 10(4) and further considering the condition of the courthouse and the Des Moines business area and other areas shut down or devastated by the flood which occurred during that time the Court is going to allow the Motion to Suppress to be filed and heard due to good cause shown for delay.

The evidence presented at the Motion to Suppress hearing held on September 1, 1993, indicates that on May 17, 1993, Officer Blad of the Des Moines Police Department was on duty. Officer Blad had been a police officer for one and a half years at this time on May 17, 1993. At approximately 7:30 p.m. she came into contact with the defendant, John Scott, who was a passenger in a motor vehicle on that date. The reason for the contact with the defendant was that the officer received a report of shots fired and the vehicle in which the defendant was riding was thought to be the vehicle from where the shots came from. Officer Blad with the help of another officer stopped this vehicle and at that time the defendant and the driver of the vehicle were taken out of the car by gunpoint and patted down and searched for weapons.

During this search Officer Blad located something in the right pocket of the defendant by patting down the outside of that pocket. Officer Blad testified that she thought it was narcotics but at that time did ask the defendant what it was. The defendant responded at that time that it was marijuana. At that time Officer Blad did take it out of the defendant's pocket after he did tell her what was contained in his pocket. Officer Blad further questioned the defendant concerning how much it cost to buy the marijuana and where he got it from. The evidence Also indicates that there was not Miranda warnings given to the defendant at this time.

Officer Blad further testified that at the time she patted down the defendant she thought that what she felt in the defendant's pocket was narcotics or marijuana and did not think it was

anything else. She further testified that she knew it was not a weapon when she did feel the item in the defendant's pocket.

The testimony of the defendant, John Scott, basically confirmed the scenario as described by Officer Blad in her testimony. The only additional facts were that during the search the defendant was told to place his hands on the trunk of the vehicle and to spread his legs and the pat-down search started at that time.

CONCLUSION OF LAW

At the outset the court determines that the stop of the vehicle in which the defendant was a passenger on May 17, 1993, was permissible under the Supreme Court case of Terry v. Ohio, 392 US 1 (1968) and its progeny. At the time of the stop of the vehicle in which the defendant was a passenger the officer did have a reasonable and articulable

suspicion to investigate or believe that the vehicle contained weapons due to the information concerning shots fired from a vehicle at that time and place.

The concern that his Court has, however, is the scope of the search and the other requirements of Terry v. Ohio. In Terry v. Ohio the Supreme Court of the United States stated that where a police officer observes unusual conduct which leads that officer to reasonably believe or conclude in light of his or her experience that criminal activity may be afoot, that officer may briefly stop the suspicious person and make reasonable inquiries aimed at confirming or dispelling the suspicions. In addition, when an officer is justified in making that stop and interviewing the individual that officer may upon reasonable suspicion that the person is presently armed and dangerous conduct a pat-down

search to determine whether that person is in fact carrying a weapon. The purpose of this limited search is not to discover evidence of a crime but rather to allow the officer to pursue the officer's duties of investigation without fear of violence.

The defendant relies upon the recent United States Supreme Court case of Minnesota v. Dickerson, 113 S.Ct. 2130 (1993). Although the State of Iowa suggests that this case is totally different from the facts at hand, the Court feels that the facts are sufficiently similar that the principles as espoused in Minnesota v. Dickerson are applicable to this case.

In the Dickerson case, during a pat-down search under the rules as expressed by Terry v. Ohio, an officer discovered a small lump in the front pocket of the defendant. The officer stated at that

time that he examined it with his fingers and it slid and it felt to be a lump of crack cocaine in cellophane. Minnesota v. Dickerson, 113 S.Ct. 2130, 2133 (1993). At that time then the officer reached into the defendant's pocket and retrieved a small plastic bag containing one-fifth of one gram of crack cocaine.

In the present case Officer Blad testified that she felt an object in the front pocket of the defendant which she thought was narcotics. At that point rather than manipulating the object she asked the defendant what it was to which the defendant stated it was marijuana. At that time she then removed the marijuana from the defendant's pocket. In Minnesota v. Dickerson the United States Supreme Court reasoned that although the officer was lawfully in a position to feel the lump in the defendant's pocket, the object was not

immediately apparent to the officer at that time that it was contraband. Minnesota v. Dickerson, 113 S.Ct. 2130, 2139 (1993). The Supreme Court went on to state that rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by Terry v. Ohio or by any other exception to the warrant requirement. Id.

Because the officer in this case made further inquiry of the defendant as to what was in his pocket it is clear to this Court that the object was not immediately apparent as being marijuana to Officer Blad. Therefore, the scope of this search went beyond the requirements of Terry v. Ohio and for this reason the evidence seized pursuant to that search on May 17, 1993, is hereby suppressed.

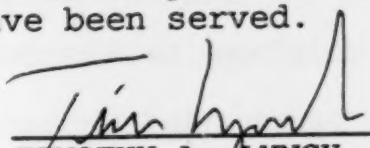
In addition, the Court would note that the facts further indicated that the

defendant was in custody at the time of the pat-down search by Officer Blad. This is indicated by the fact that guns were drawn and it was apparent that the defendant's freedom of movement was restrained significantly. Therefore, the questioning of the defendant by Officer Blad concerning what was in his pocket should have been propounded to him only after the defendant had been advised of his rights as per Miranda.

Motion to Suppress is sustained.

CERTIFICATE OF SERVICE

I, Timothy A. Lynch, a member of the Bar of this Court, hereby certify that on this 20th day of September, 1994, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Bonnie J. Campbell, Attorney General, Hoover State Office Building, 1300 East Walnut Street, Des Moines, Iowa 50319, counsel of record herein. I further certify that all parties required to be served have been served.



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Supreme Court, U.S.
FILED
OCT 19 1994
OFFICE OF THE CLERK

No. 94-679

In The

Supreme Court of the United States

October Term, 1994

JOHN A. SCOTT,

Petitioner,

v.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari
To The Iowa Supreme Court

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is generally acceptable to Respondent. However, Respondent must correct two inaccuracies and one omission contained in the Petition.

First, Petitioner states in Section II of the Questions Presented that four police officers ultimately were involved in the investigatory stop. As correctly found by the Iowa Supreme Court, police officer Larina Blad was alone when she initially stopped the vehicle in which Petitioner was a passenger; soon, two additional officers arrived. Pat-down searches of Petitioner and the driver were then conducted. *State v. Scott*, 518 N.W.2d 347, 348 (Iowa 1994). There was no fourth police officer involved in the stop.

Second, Petitioner states that officer Blad conducted a pat-down search of him, and asked him to identify an item in his pocket, "while still holding [him] at gun point." Petition pp. 4-5. It is true that officer Blad initially had her gun drawn when she ordered Petitioner to get out of the car. *State v. Scott*, 518 N.W.2d at 348. However, there is no evidence her gun remained drawn throughout the encounter; indeed, her testimony at the suppression hearing indicates she reholstered her weapon once the two backup officers arrived. Suppression Tr. p. 4. As for the backup officers, there is no evidence they ever drew their weapons.

Finally, Petitioner correctly states that during the pat-down search officer Blad felt something in Petitioner's pocket which she determined was not a weapon, but was

something else – the exact nature of which was not immediately apparent. Petition p. 4. Petitioner neglects to state that the officer thought that object might well be drugs. *State v. Scott*, 518 N.W.2d at 349.

SUMMARY OF THE ARGUMENT

During a pat-down search of Petitioner for weapons, the officer felt an object in Petitioner's pocket which she suspected of being drugs, and she asked him to identify it. Petitioner argues that question violated the Fourth Amendment. Contrary to his claim, no constitutional violation occurred and the Iowa court's decision is entirely consistent with the decisions of this Court. Nor is Petitioner correct in asserting there is a significant split of authority requiring resolution by this Court.

Petitioner further argues the officer's question should have been preceded by *Miranda* warnings because he was in custody. He rests his custody claim on the facts that a gun had been displayed and the pat-down search was conducted while Petitioner stood with his hands placed on a car and his feet spread. These measures were entirely reasonable to promote safety of the police officer. Application of relevant decisions of this Court establishes that Petitioner was not in custody during the investigatory stop in this case.

Consequently, the Iowa court correctly found that *Miranda* warnings were unneeded.

ARGUMENT

REASONS FOR DENYING THE WRIT

BECAUSE IT IS NOT TRUE THAT THE IOWA COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT OR WITH A SIGNIFICANT NUMBER OF DECISIONS OF OTHER COURTS, PETITIONER HAS FAILED TO RAISE A SUBSTANTIAL FEDERAL ISSUE UNDER THE FOURTH AND FIFTH AMENDMENTS.

A. There Is No Substantial Federal Issue Under The Fourth Amendment.

Petitioner argues that when officer Blad asked him during the pat-down search to identify the object in his pocket, the line was crossed between a protective search for weapons and a search for evidence. According to Petitioner, the discovery of drugs violated this Court's decisions in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1968, 20 L.Ed.2d 889 (1968), and *Minnesota v. Dickerson*, 508 U.S. ___, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Consequently, Petitioner believes the Iowa court's decision is inconsistent with those cases. He also asserts the decision is inconsistent with decisions by the courts of several other states and two federal courts of appeal. Petitioner does not dispute the Iowa court's determination that the stop and pat-down search of Petitioner were proper because the car in which he was riding had recently left an area where gunshots had been fired. *State v. Scott*, 518 N.W.2d at 348-49. However, he believes that once officer Blad concluded that the object in Petitioner's pocket was not a weapon, the encounter should have been terminated.

According to Petitioner, the Fourth Amendment was violated by any continued detention or questioning unrelated to the reason for the stop.

There can be no doubt, however, of the simple fact that the *Scott* decision does not conflict with *Terry v. Ohio* and *Minnesota v. Dickerson*. Only a proper, limited pat-down search over Petitioner's outer clothing was conducted; officer Blad did not "search" the object in Petitioner's pocket by squeezing and sliding it, as was true of the unlawful search in *Dickerson*. 508 U.S. at ___, 124 L.Ed.2d at 346-47. Instead, the officer asked Petitioner to identify the object, which she suspected of constituting drugs. Asking such a question is *not* a search. *See Coolidge v. New Hampshire*, 403 U.S. 443, 487-90, 91 S.Ct. 2022, 29 L.Ed.2d 564, 594-96 (1971); *United States ex rel. Bilokumsky v. Todd*, 263 U.S. 149, 155, 44 S.Ct. 54, 68 L.Ed. 221, 224 (1923).

Petitioner argues the *Scott* decision is inconsistent with the decisions of some state courts and federal courts of appeal. Those decisions, he asserts, held that it was illegal to continue a detention or to question a suspect about an unrelated subject after the suspicions leading to the stop had been dispelled. Except for one of those decisions, the cases Petitioner cites are distinguishable; none of them involved the situation here, where the officer's determination that the object felt during a pat-down was not a weapon was *simultaneous* with the officer's conclusion that it might be drugs. Although officer Blad was unable to satisfy the plain touch requirements of *Minnesota v. Dickerson*, because she was not sure the object was narcotics, it was not unconstitutional for her to ask Petitioner to identify the object when her suspicions

became aroused through the sense of touch. *See United States v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993) (although officer's questions must relate to the purpose of the stop, if the suspect's responses and the circumstances give rise to suspicions unrelated to the initial reason for the stop, an officer may broaden the inquiry and satisfy those suspicions). This is not a case where a *Terry* stop lasted longer than required to satisfy the initial reason for the investigation.

On facts similar to those in this case, the Court in *State v. Beveridge*, 112 N.C. App. 688, 436 S.E.2d 912, *aff'd*, ___ N.C. ___, 444 S.E.2d 223 (1994), did reach a result different from the holding in this case. A conflict between only two state reviewing courts, however, is not a substantial federal issue.

In sum, the decision in *State v. Scott* was correct and consistent with the relevant decisions of this Court. Even if that were not so, there is no significant split of authority which warrants resolution by this Court. The Petition for Writ of Certiorari should be denied.

B. There Also Is No Substantial Federal Issue Under The Fifth Amendment.

Applying the test announced in *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Iowa court concluded that Petitioner was not in custody, and *Miranda* warnings were unneeded, when the officer asked him to identify the object in his pocket. *State v. Scott*, 518 N.W.2d at 350. Of course, the Iowa court was correct. The investigatory stop was conducted in public, as was also true of the stop in *Berkemer*. An undue

number of police officers were not involved, and there was no extensive questioning during the encounter. Moreover, the passage of time between the initial stop and officer Blad's question regarding the object in Petitioner's pocket was undoubtedly brief. Nor had the officer made any statements to Petitioner before finding the drugs which would tend to indicate that the detention would be anything but limited. These considerations show Petitioner was not effectively in custody for purposes of *Miranda*. *See Berkemer*, 468 U.S. at 437-42, 82 L.Ed.2d at 333-36.

It is true that officer Blad *initially* displayed a weapon before the backup officers arrived. However, display of a weapon during a stop to investigate a crime of violence is reasonable. *See United States v. Hensley*, 469 U.S. 221, 224, 235, 105 S.Ct. 675, 83 L.Ed.2d 604, 609, 616 (1985). Of course, the same must be concluded about requiring Petitioner to take a particular stance (hands on the car, feet spread) during the pat-down search.

Consequently, Petitioner's claim that this case conflicts with Supreme Court precedent is unfounded. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the above reasons, the State respectfully asks this Court to deny Petitioner John A. Scott's Petition for Writ of Certiorari.

Respectfully submitted,

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